

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 618

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

**CAPITAL GAINS RESEARCH BUREAU, INC. AND HARRY P.
SCHWARZMANN**

REPLY TO BRIEF IN OPPOSITION

Respondents attempt to present this case as though it involves only a factual dispute as to whether the Commission had failed to prove facts sufficient to justify a preliminary injunction. However, the opinions of the courts below demonstrate that the reason the Commission was denied a preliminary injunction was because, under the courts' interpretation of the statute, the facts established by the Commission did not show a violation.¹ Thus, the court of appeals, *en banc*, refused the injunction because "the SEC's proof tends only to show that, at most, defendant

¹ There was thus no occasion for the Commission to proceed to trial on the permanent injunction, as respondents suggest (Br. 8), since under the interpretation of the statute by the court below the permanent injunction would have had to be denied.

Schwarzmann profited personally from the predictable market effect of his honest advice" and this course of conduct by respondents was not a "device, scheme or artifice to defraud," or a "practice * * * which operates as a fraud or deceit" upon the investment adviser's clients in violation of Section 206 (1) and (2) of the Investment Advisers Act of 1940 (Pet. App. 21a). It is for determination of this important statutory issue—whether the facts shown by the Commission constitute a violation of the Act—that we have brought this case to the Court.²

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

PETER A. DAMMANN,
General Counsel,

Securities and Exchange Commission.

JANUARY 1963.

²Two factual contentions advanced by respondents are without merit. Their suggestion that there was no proof that their recommendations influenced the market (Br. 6) is answered by the statement of the court of appeals that the SEC's proof showed that respondents "profited personally from the *predictable* market effect" of their advice (Pet. App. 21a) (*emphasis added*).

Respondents' charge (Br. 7) that the chart at page 5 of the petition misstates the facts of the case is also without merit. Their statements of what the actual profits or losses were reflect nothing more than their insistence that certain transactions, irrelevant under the Commission's theory, be set off against their profits (R. 12, 19, 21-23, 26), or are based on conclusory figures which do not indicate where it is claimed that the detailed facts relied on by the Commission were erroneous (R. 11, 13, 23-25).